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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, BOWMAN DAIRY COMPANY, BELOIT DAIRY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS OR AFFIRM

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UNITED STATES OF AMERICA,
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THE BORDEN COMPANY, ET AL.,
Defendants-Appellees.

MOTION TO DISMISS OR TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the District Court, on the ground that no substantial questions are presented by the appeal.

This is a direct appeal, pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, from the final judgment entered on June 17, 1953, by the District Court and that court's denial of appellant's motion for a new trial on August 6, 1953. Appeal was allowed on October 2, 1953, and appeal papers were served on appellees on the same day.

There are four "questions presented" by appellant's statement as to jurisdiction. Three of these questions in-

volve rulings on evidence and the fourth pertains to an exercise of the trial court's discretion which was strictly in accord with a recent controlling decision of this Court.

None of the trial court's findings of fact and conclusions of law are attacked on this appeal. Nor does appellant challenge the trial court's ultimate conclusion that the voluminous evidence introduced by appellant was insufficient to support its allegations of violations of the Sherman Act. Rather, it is appellant's position that the trial court would have reached a contrary conclusion if it had not "improperly excluded the vitals of the government's case."

Each of the three evidentiary rulings was proper. Moreover, even if all the proffered evidence had been received, nothing of substance would have been added to the record. The appellant's offers of proof, far from containing any "vital" evidence, merely covered cumulative matters which had already been thoroughly and carefully considered by the District Court.

The Government filed the instant civil action on June 18, 1951. The complaint alleged violations of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act. On February 12, 1953, and continuing daily thereafter to March 4, 1953, a pre-trial conference was held. During this conference five of the defendants and the Government reached agreement upon the terms of a consent decree which was entered on February 19, 1953.

As a result of the pre-trial conference, the court entered a lengthy pre-trial order containing numerous agreements of fact and agreements on evidentiary matters and issues.[1] The court also entered an order limiting the proof with certain exceptions to a period subsequent to September 16, 1940, the date on which a consent decree was entered by

[1] Trial Transcript 2823-2824.

the same District Court in the case entitled *United States* vs. *Borden, et al.*, No. 2088.[2]

The trial began on March 4, 1953, and the Government rested on March 23, 1953—fourteen trial days later. During this time the Government offered over fifteen hundred exhibits of which over one thousand were received in evidence, and called over sixty-five witnesses in support of its case. At the close of the Government's case, each of the appellees made a motion to dismiss. Arguments on these motions were heard on March 24, 25 and 26, 1953. On March 30, 1953, the court announced that, having weighed the evidence in accordance with Rule 41(b) of the Federal Rules of Civil Procedure, the court had decided that the Government's evidence did not warrant the relief sought in the complaint.[3] Findings of Fact, Conclusions of Law, and Judgment were entered on June 17, 1953. The court's exhaustive opinion discussing the evidence is found at page 2818 of the Trial Transcript and is reported at 111 F. Supp. 562.

I

The first question presented by appellant is stated as follows:

> Whether the District Court erred in not allowing the Government to use a deposition, taken in another case, for the purpose of showing that part of the testimony given by a crucial Government witness, who proved hostile, was contrary to statements made in his earlier deposition.

The trial court properly refused to permit appellant to use the deposition of H. C. Eggleston in an effort to impeach his trial testimony. The first time the Government offered to use this deposition, the trial court held that it was un-

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[2] This order appears at ——— of the Record.

[3] Trial Transcript 2826.

available, the judge presiding in the action in which the deposition was taken [4] having previously ruled that it was under seal and that the seal could not be broken at the request of the Government. This ruling is not before this Court.[5]

The attack is on the trial court's second refusal to permit appellant to use Eggleston's deposition—in other words, upon the trial court's refusal to reverse a ruling which was admittedly proper when made. Specifically, appellant attacks the court's rejection of its offer of proof filed on March 10, 1953, containing selected excerpts from the deposition. Before making this offer, appellant had examined the witness Eggleston for several days, using numerous documents and a sworn statement which Eggleston had given to the plaintiff's attorney in the case in which the deposition was taken, in its unsuccessful attempt to impeach his credibility.[6]

The deposition was entirely consistent with Eggleston's trial testimony. A comparison of this trial testimony with the offer of proof shows that: (1) much of the offer actually corroborates without contradiction portions of Eggleston's trial testimony; (2) substantially all of the offer pertains to a time prior to the 1940 consent decree and therefore was immaterial under the court's order limiting the plaintiff's

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[4] *Dean Milk Company* v. *American Processing and Sales Company, et al.*, No. 49 C 1159 (D.C., N.D. Ill., E.D.), to which Beloit Dairy Company was not a party.

[5] In its motion for a new trial, appellant did not attack the trial court's first ruling that the deposition was not available. It had previously conceded that the ruling of the judge in the *Dean* case that the seal could not be broken at the request of the Government "probably was correct." (Trial Transcript 158.) It is not surprising that appellant does not repeat the argument made in the trial court that ". . . the sovereign state of the United States has a right to procure its evidence wherever it can, and I don't think any court should shut off the United States which is here trying to enforce a statute . . ." (Trial Transcript 159.)

[6] See Trial Transcript 486-847.

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proof,[7] and (3) the offer of proof merely duplicates material in the Eggleston affidavit and in the documents which appellant did use in its efforts at impeachment. The affidavit was prepared by counsel for plaintiff in the *Dean* case as the basis for his examination of the witness Eggleston in the deposition and presumably contains all of the material covered in the deposition. (Trial Transcript 176-177.) The trial court appraised the offer of proof in the light of these controlling factors and came to the considered conclusion that Eggleston was a credible witness. When this Court studies the testimony, the offer of proof, and defendants' objections to that offer, it will come to the same conclusion.

When due regard is given to the trial court's familiarity with the full trial record and its extended opportunity to study Eggleston's appearance and demeanor on the witness stand, it seems plain that this issue presents no substantial basis for appellate review.

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[7] Mr. Eggleston's employment by the Bowman Dairy Company terminated approximately ten years before he took the witness stand. (Trial Transcript 407-408.) Mr. Philippi, the only other Bowman official referred to in the offer of proof, left the company in 1941. Trial Transcript 539.) Substantially all of the questions and answers quoted in the offer of proof relate to the period prior to 1940. In some instances the time is expressly identified (see e.g. offer of proof pages 7-8 quoting from deposition pages 47-49 pertaining to 1938 and 1939, and offer of proof page 9 quoting from deposition pages 52-54 pertaining to 1932 or 1933), and in others it is plain from the context that the witness was discussing a time prior to 1940 (see e.g. offer of proof pages 3-4 quoting from deposition pages 32-33 pertaining to the time when "Dean Milk Company came into Chicago".) Even if that were not plain, answers not specific as to time are obviously not necessarily contradicted by trial testimony specifically confined to the period after the entry of the consent decree in 1940. The only portion of the deposition which identifies a time after 1940 related to negotiations between Bowman and A & P in 1942; those negotiations were fully described by Mr. Eggleston at the trial in a manner completely consistent with his deposition, and did not remotely tend to prove any "conspiratorial acts" between Bowman and any other defendant. (See Trial Transcript 723-753.)

II

The second question presented by appellant is phrased as follows:

> Whether the court erred in ruling that certain tape recordings of statements made by various agents of defendants, which the court excluded, were within the privilege attaching to the "work product" of an attorney and that such privilege had not been waived.

The witness Newey testified that he made tape recordings of interviews with sales representatives of various dairies. Except for one salesman whom Newey failed to identify in court (Trial Transcript 2320-2321), none of the interviews was with a representative of any of the appellees. A verbatim transcript of each tape was made. The witness Newey had all of these transcripts with him in the court room during his direct examination [8] and used one of them to refresh his memory while testifying.[9] Further, these transcripts were shown by Newey to appellant's counsel [10] and were admittedly in appellant's possession along with the tapes.[11] Thus, the transcripts were available to appellant and were used by the witness Newey to refresh his recollection.

Except for one transcript, neither the tapes nor the transcripts have ever been available to appellees. Appellees were denied the right to see them by Judge Igoe in the *Dean* case on the ground that they constituted the work product of Mr. McConnell, attorney for the plaintiff in that case. When this same material was subpoenaed by appellant in this case, the trial court respected Judge Igoe's

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[8] Trial Transcript 2310-2311; 2323.

[9] Trial Transcript 2241.

[10] Trial Transcript 2323.

[11] Exhibit 7 attached to plaintiff's motion for a new trial.

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ruling and Mr. McConnell's claim of privilege and refused to order production of the material. The claim of privilege was never waived by Mr. McConnell,[12] and Government counsel violently objected to appellee's demand that they be given an opportunity to see any transcript or tape used by Newey to refresh his recollection.[13]

Subsequently, appellant obtained possession of both the tapes and transcripts, but for reasons known only to itself, did not offer any of this material in evidence. The record does not support the assertion that they contain "vital" or "critical" evidence. Indeed, it demonstrates the contrary. The witness Newey admitted on cross-examination that he picked out the parts of the conversations he thought would help out appellant's case.[14] Furthermore, the cross-examination of the witness Newey based upon the one transcript available to defendants clearly shows that Newey's testimony did not even reflect the true content of that part of

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[12] Early in the trial, appellant's counsel informed the court that it only intended to use the tapes to substantiate the testimony of the witness Newey. (Trial Transcript 172.) Two days before appellant was to rest its case, it showed the McConnell letter to the court. (Trial Transcript 2211-2214.) This letter was at most a delegation of authority to Newey to waive McConnell's privilege, if necessary, "for the purpose of protecting yourself as a witness", and to deliver the tapes or transcripts to the defendants. Newey never exercised any such authority and the Government objected to such delivery to the defendants. In any event, the letter certainly was not an unequivocal waiver of the privilege. McConnell was appellant's witness and could have been recalled to clear up any misunderstanding concerning the meaning of this letter. Appellant completely failed to do so and, furthermore, neither authenticated the letter nor offered it in evidence.

[13] Trial Transcript 2213:

"Mr. Ball: We shall demand, of course, the defendants, that we be given the opportunity to see the documents or material that the witness is permitted to use to refresh his recollection.

"Mr. Jinkinson: Of course, we violently object."

[14] Trial Transcript 2322.

his conversation with one of the defendant's salesmen which he purported to relate on direct examination.[15]

Instead of offering the tapes or transcripts in evidence appellant presumably chose to rely upon the testimony of the witness Newey. With respect to his testimony, the court found:

> "At the trial, witness Newey was without any apparent present recollection of his conversations with the defendants' representatives. He used notes, assertedly to refresh his recollection, but his testimony appeared to be and was largely a paraphrase of these notes. These notes were not his past recollection recorded, but were made by him shortly before his appearance on the stand from a reading of transcripts of the various tape recordings. One of these transcripts was also used to refresh his memory. The aforesaid notes were admittedly extracted from the transcripts of the tape recordings to suit plaintiff's convenience. The court completely disregards the testimony of witness Newey and holds that his testimony is valueless."[16]

Thus, appellant now asks this Court to reverse the judgment below on the basis of material it failed to offer in evidence and concerning which it failed to make any offer of proof. The one transcript available to appellees demonstrates the need for such an offer inasmuch as the transcript did not corroborate the testimony of Newey and contained a great deal of material Newey purposely disregarded in preparing to testify.

It has been repeatedly held that a party must make an offer of proof with respect to excluded evidence to preserve the ruling on appeal so the reviewing court is able to determine whether the ruling involved reversible error.[17] This, appellant in the instant situation, completely failed to do.

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[15] Trial Transcript 2344-2353.

[16] Findings of Fact, paragraph 20.

[17] See e. g. *Herencia* v. *Guzman*, 219 U.S. 44, 46 (1910).

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Appellant has admitted that it failed to offer the tapes but stated by way of excuse that inasmuch as the trial court refused to allow it to set up certain sound reproducing equipment in the court room, such an offer would have been useless.[18] This excuse seems to be predicated on the concept that if the court refused to allow appellant to install the reproducing equipment the offer would be worthless. However, even this type of excuse completely overlooks the fact that appellant had in its possession the transcripts and could have offered them in evidence. Without such an offer, this Court does not have before it the information necessary to enable it to determine whether the alleged exclusion constituted reversible error.

III

The third question presented by appellant is phrased as follows:

> Whether the court properly held inadmissible, under the Illinois "dead man's" statutes, testimony as to conversations with a deceased agent of a defendant.

Appellant's sole contention here is that neither Eggleston nor Moser was "a party to the action" or "a party to a contract the subject of litigation". Appellant did not raise the point during the trial. Instead, appellant took the position that the Illinois rule "doesn't apply unless it is against the dead man's estate or interests".[19] This position was plainly erroneous and rejected by the trial court. This is apparently conceded by appellant, for it has now abandoned its original position.

If the proffered testimony of the witness Moser is to be viewed as showing a contract between Moser and the de-

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[18] See Exhibit 7 attached to plaintiff's motion for a new trial.

[19] Trial Transcript 29.

ceased Baril not to solicit each other's customers, it would appear that the testimony falls within the ban of the Illinois rule. Under appellant's own statement of the rule, it applies to "a party to a contract the subject of litigation", and if there was an agreement between the witness Moser and appellee Borden, such contract would have been directly affected by the decree sought by appellant in this case and thus Moser would have been a person interested in the event of the suit.

Furthermore, the assertion that the excluded evidence was of "vital" importance is again unsupported by the record. Appellant's only offer of proof with respect to the rulings complained of was as to the witness Moser. The offer of proof as to the witness Eggleston does not include any of the material excluded by the trial court under the so-called "dead man's" statute.[20] The appellant had the option, in lieu of an offer of the evidence sought in an action tried without a jury, to request the court to take and report the evidence in full in accordance with the provision of Rule 43(c) of the Rules of Civil Procedure for the United States District Courts. This option was designed to cover a situation where the party submitting the testimony was not sufficiently certain of its nature to make an accurate offer. The appellant in the instant case failed to exercise either option and, in consequence, has failed to properly preserve the ruling on the excluded evidence for review.

The Moser offer of proof did not show any violation of law by appellee Borden and the witness Moser, nor did it tend to prove the existence of the conspiracy charged. Even if this offer of proof is viewed as showing a unilateral threat by Borden to take customers from Moser if

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[20] Compare Eggleston offer of proof with Trial Transcript 638-639 and 769-770.

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he continued to bid on a public institution previously served by Borden, it is no more significant than several similar unilateral threats by Beloit, all of which are in the record and were evaluated by the lower court in rendering its judgment.[21] Such a threat would not tend to prove the conspiracy which plaintiff sought to establish, since nothing in the offer of proof or record indicates that Borden was acting in concert with other defendants. The lower court held that such "isolated instances cannot establish the existence of a conspiracy among ten defendant dairies."[22]

Thus, appellant relies, as part of the "vitals" of its case, on one bit of excluded evidence offered through the witness Moser which is at best cumulative and, therefore, should not under any circumstances, be considered reversible error.

IV

The final question presented by appellant is whether the District Court was justified in refusing to grant equitable relief to the Government. In explanation of its refusal, the trial court stated in Conclusion of Law No. 9:

> "Since the violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations, and since the Dean decree assures that there will be no new violations, this court shall not grant the injunctive relief sought by plaintiff under Section 2(a) of the Clayton Act." (Findings of Fact, Conclusions of Law and Judgment, page 22.)

The record shows no threat whatever of future violations of the Clayton Act. Accordingly, there is no substance to the contention that the Chancellor abused his discretion in determining that there was no need for an injunction. "The sole function of an action for injunction is to forestall future

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[21] See 111 F. Supp. at 578 and Findings of Fact, paragraphs 27 and 28.

[22] 111 F. Supp. at 578.

violations." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952).

This Court's recent decision in *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), is directly in point. In that case the United States proved violations of Section 8 of the Clayton Act which were terminated after suit was commenced. After noting that the trial court's *power* to enter an injunction survived the discontinuance of the illegal conduct, this Court turned to the separate question of whether the trial court had properly exercised its discretion when it refused to grant relief requested by the United States. On this issue, this Court stated:

> ". . . the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it." (345 U. S. at page 633.)

The fact that appellant is not a party to the *Dean* decree is immaterial. There was no decree at all in the *Grant* case. The question is whether there is a reasonable basis for the Chancellor's determination that there is no significant threat of future violations of the statute. Conclusion of Law No. 9 certainly sets forth an eminently reasonable basis for such a determination.

Likewise irrelevant is the fact that appellant has a duty to enforce the antitrust law. Of course it has. But it can perform that duty in the future regardless of the outcome of this case. Affirmance of the trial court will be without prejudice to future suit if any of the appellees engage in illegal practices, whether or not such practices were involved in the present action. See *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339-340 (1952).

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We respectfully submit, therefore, that the appeal presents no substantial question for the decision of this Court, and that the judgment of the trial court should be affirmed or, in the alternative, that the appeal should be dismissed.

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October 19, 1953.